

### REMARKS/ARGUMENTS

The Applicants appreciate the Examiner's continued consideration of the present Application and the Examiner's indications in the present Office action that claims 1-21 and 28-31 are allowed and that claims 23-24 would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. In addition to allowing claims 1-21 and 28-31 and indicating the allowability of claims 23-24, the Office action further indicated that claim 22 was rejected under 35 U.S.C. 102(b) as being anticipated by Lewis et al. (U.S. Patent No. 5,812,394) and claims 25-27 were rejected under 35 U.S.C. 101 for double patenting in view of Ryan et al. (U.S. Patent No. 6,477,435).

In response to the rejection of claim 22 under 35 U.S.C. 102(b), the Applicants have canceled claim 22. Additionally, the Applicants have amended claim 23 to include all of the limitations of previously-pending claim 22. Thus, the Applicants submit that claim 23 is now in condition for allowance, and that claim 24 which depends from claim 23 is also in condition for allowance for at least the reasons claim 23 is in condition for allowance.

As for the double patenting rejection under 35 U.S.C. 101, while the Applicants recognize the relatedness of claims 25-27 to the claimed subject matter of Ryan et al., the Applicants respectfully submit that claims 25-27 are not identical to any of the claims of Ryan et al. Indeed, the claims of Ryan et al. differ from claims 25-27 of the pending Application in numerous ways. For example, all of the claims of Ryan et al. relate to a development tool or method that is applicable in relation to an industrial controller, while claims 25-27 do not recite any limitation involving an industrial controller. Also for example, in contrast to pending claims 25-27, all of the claims of Ryan et al. recite that the instantiating/producing includes "uniquely denot[ing] the control variables" of all of the program fragments/instantiated objects of the control program. Upon further inspection of the claim language of claims 25-27 and the claims of Ryan et al., additional differences in the claims can also be determined.

In view of these differences between the claim language of claims 25-27 and the claims of Ryan et al., claims 25-27 could be literally infringed by a given system or method even though the claims of Ryan et al. would not be infringed by that same system or method. For example, claims 25-27 could be literally infringed in the context of creating a control program for a non-industrial controller, or in circumstances where

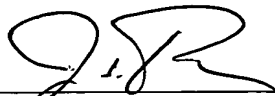
instantiation did not involve "uniquely denoting the control variables", where Ryan et al. would not be literally infringed. Because claims 25-27 are not identical to the claims of Ryan et al. and, more particularly, because claims 25-27 could be literally infringed without literally infringing Ryan et al., the Applicants respectfully submit that a statutory double patenting rejection is inappropriate in this instance (see M.P.E.P. Section 804 II(A)).

At the same time, although the Applicants do not admit that a non-statutory, "obviousness-type" double patenting rejection would necessarily be appropriate in relation to claims 25-27, the Applicants are nevertheless willing to submit a terminal disclaimer in relation to Ryan et al. if the Examiner requests such disclaimer in order for claims 25-27 to be allowed. In particular, the Applicants have attached hereto a draft terminal disclaimer that the Applicants would be willing to execute and submit in the event the Examiner indicates that this terminal disclaimer would be sufficient to obtain allowance of claims 25-27. The Applicants respectfully request that the Examiner indicate whether such terminal disclaimer would be satisfactory in the Examiner's next communication.

Given the Applicants' Remarks and Amendments, the Applicants respectfully request reconsideration and allowance of the present Application. In view of the above comments, the Applicants believe that the present Application is in condition for allowance, or at least will be in condition for allowance upon submission of a terminal disclaimer by the Applicants (if such is requested by the Examiner). The Applicants therefore look forward to a swift reply from the Examiner so that the present Application can proceed to issuance. The Applicants invite the Examiner to telephone the Applicants' attorney at the number listed below if such would expedite the processing of this patent Application.

Respectfully submitted,  
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By: \_\_\_\_\_



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